No. 10487.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE PENFIELD COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

SECURITIES AND EXCHANGE COMMISSION,
Appellee.

OPENING BRIEF ON APPEAL.

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This is an appeal by the defendant and appellant Penfield Company of California, a corporation, from an order granting an application for subpoena *duces tecum* to the applicant, Securities and Exchange Commission, through its attorneys, who applied to the District Court of the United States for a rule to show cause against the appellant why it should not produce the following before the Securities and Exchange Commission:

> "All books, records, documents, contracts, agreements, checks, bank statements, correspondence files and all other papers and memoranda in which have been entered a record of the transactions and business of The Penfield Company of California from the date of its incorporation to the date of this subpoena, including in particular, twenty items."

The order of the Securities and Exchange Commission alleged as follows:

> "The Commission, having considered the aforesaid report by members of the staff, and for the purpose of (1) determining whether the persons named in the caption of this Order have violated or are about to violate the provisions of Sections 5(a) and 17(a) of the Securities Act of 1933; and (2) aiding in the enforcement of said Acts; deems it necessary and appropriate that an investigation be made to determine whether said persons have engaged in the acts and practices set forth in paragraph II hereof or any acts or practices of similar purport or object."

In a supplemental order of the Securities and Exchange Commission the Commission alleges as follows:

> "The Commission, having considered the aforesaid report by members of its staff, and for the purpose of (1) determining whether the companies and persons named in the caption hereof have violated or are about to violate the provisions of Sections 5(a) and 17(a) of the Securities Act of 1933; and (2) aiding in the enforcement of said Act; deems it necessary and appropriate that an investigation be made to determine whether the said companies and persons, or any of them, have engaged in the acts and practices set forth in paragraph III hereof, or any acts or practices of similar purport.
>
> "It Is Ordered, pursuant to Section 20(a) of the Securities Act of 1933 that the order and supplemental order directing an investigation mentioned in paragraph I hereof be and it hereby is supplemented and amended to include for determination the matters set forth in paragraph V hereof.

"It Is Further Ordered, pursuant to the provisions of Section 19(b) of the Securities Act of 1933 that for the purpose of such investigation, William Green, C. J. Odenweller, Jr., Charles E. Greaney, Hiram C. McDade and Harold O. Schroeder, and each of them, is hereby designated an officer of the Commission and empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda or other records deemed relevant or material to the inquiry, and to perform all other duties in connection therewith as authorized by law."

Subsequent to the issuance of these orders of the Commission a subpoena *duces tecum* was issued [Exhibit C, R. 15] directing A. W. Young, Secretary-Treasurer of The Penfield Company of California, *et al.,* 8900 West Beverly, Beverly Hills, Calif., to appear and produce twenty items set forth in the subpoena.

These items were:

1. Minute Book.
2. All stock certificate stub books and cancelled certificates of common and preferred stock.
3. Alphabetical list of stockholders and addresses (if not shown on stub books indicated in Item No. 2 above).
4. General Ledger.
5. Cash Book.
6. General journal.

7. Records reflecting the sale of whiskey and/or whiskey warehouse receipts by the corporation.

8. Records relating to the sale of bottling contracts of Bourbon Sales Corporation, Louisville, Kentucky, by the corporation.

9. Records relating to the sale of bottling contracts of The Penfield Company of California, by the corporation.

10. Correspondence files, including letters received from and copies of letters sent to, all stockholders of The Penfield Company of California.

11. Correspondence files containing letters received from, and copies of letters sent to, all persons to whom bottling contracts of Bourbon Sales connection with the sale o fstock of The Penfornia were sold.

12. All cancelled checks of the corporation.

13. Copies of confirmations or advices delivered in connections with the sale of stock of The Penfield Company of California or the sale of bottling contracts of Bourbon Sales Corporation, or The Penfield Company of California.

14. All original journal entries or journal vouchers supporting entries appearing in the general journal or cash book.

15. Copies of all prospectuses, sales material, sales letters, material in salesmen's kits or similar documents used in connection with the solicitation and sale of stock in The Penfield Company of California.

16. Copies of all prospectuses, sales material, sales letters, material in salesman's kits or similar documents used in connection with the sale of bottling contracts of Bourbon Sales Corporation or The Penfield Company of California.

17. Purchase invoices or records supporting the acquisition of whiskey, whiskey warehouse receipts or bottling contracts by The Penfield Company of California from private individuals for cash or in exchange for stock, bottling contracts or other securities.

18. Purchase invoices or records supporting the acquisition of whiskey or whiskey warehouse receipts from distillers, whiskey warehouse receipts brokers or other persons or companies engaged in the whiskey business.

19. Sales invoices or records supporting the disposition of whiskey, whiskey warehouse receipts or bottling contracts procured from investors.

20. Employment or other records showing names of all employees, salesmen or other personnel with last known addresses.

Upon objections to their production the application was made to the District Court of the United States, which, after hearing, granted the order and stayed the execution of the appeal herein.

Appellant assigns the following errors in the record:

I.

THE DISTRICT COURT ERRED IN HOLDING THAT THE SECURITIES AND EXCHANGE COMMISSION HAD JURISDICTION TO ISSUE ITS ORDER REQUIRING APPELLANT TO PRODUCE FOR EXAMINATION BY THE COMMISSION OR ITS REPRESENTATIVES "ALL BOOKS, RECORDS, DOCUMENTS, CONTRACTS, AGREEMENTS, CHECKS, BANK STATEMENTS, CORRESPONDENCE FILES, AND ALL OTHER PAPERS AND MEMORANDA" WHICH WERE LISTED AS ITEMS ONE TO TWENTY.

(a) The District Court erred in holding that the orders of the Commission which formed the basis of the application had complied with the statutes sufficiently to give them jurisdiction;

(b) The District Court erred in holding that each of the twenty items was within the scope and jurisdiction of the Securities Act giving the Commission power to investigate them.

II.

THE DISTRICT COURT ERRED IN HOLDING THAT THE INVESTIGATION WAS NOT A GENERAL, ROVING INQUIRY, VIOLATIVE OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND THAT IT DID NOT CONSTITUTE AN UNREASONABLE SEARCH AND SEIZURE OF THE PRIVATE PAPERS AND DOCUMENTS OF APPELLANT.

III.

THE DISTRICT COURT ERRED IN HOLDING THAT THE PROVISIONS OF SECTION 19(b) OF THE SECURITIES ACT OF 1933 AS AMENDED AND SUPPLEMENTED BY THE PROVISIONS OF SECTION 22(b) OF SAID ACT, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, ARE NOT INVALID AND UNCONSTITUTIONAL BECAUSE THEY DELEGATE JUDICIAL POWERS TO THE SECURITIES AND EXCHANGE COMMISSION IN VIOLATION OF ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES, AND DEPRIVE THE DISTRICT COURT OF JUDICIAL FUNCTIONS AS TO WHAT MATTERS ARE OR ARE NOT RELEVANT OR MATERIAL TO THE INQUIRY.

IV.

THE DISTRICT COURT ERRED IN HOLDING THAT TRANSACTIONS IN DISTILLERS' WHISKEY WAREHOUSE RECEIPTS WERE TRANSACTIONS WITHIN THE MEANING OF SECTION 2(1) OF THE SECURITIES ACT AS AMENDED IN 1933.

V.

THE DISTRICT COURT ERRED IN HOLDING THAT BOTTLING CONTRACTS OF THE BOURBON SALES CORPORATION OR THE PENFIELD COMPANY OF CALIFORNIA WERE TRANSACTIONS IN SECURITIES, AS DEFINED IN SECTION 2(1) OF THE SECURITIES ACT OF 1933, AND THEREFORE CONFERRED JURISDICTION UPON THE SECURITIES AND EXCHANGE COMMISSION.

ARGUMENT.

I.

The District Court Erred in Holding That the Securities and Exchange Commission Had Jurisdiction to Issue Its Order Requiring Appellant to Produce for Examination by the Commission or Its Representatives "All Books, Records, Documents, Contracts, Agreements, Checks, Bank Statements, Correspondence Files, and All Other Papers and Memoranda" Which Were Listed as Items One to Twenty.

(a) The District Court Erred in Holding That the Orders of the Commission Which Formed the Basis of the Application Had Complied With the Statutes Sufficiently to Give Them Jurisdiction.

The authority for the Securities and Exchange Commission to secure a subpoena *duces tecum* is contained in Sections 19(b) and 22(b), which provide as follows:

Section 19(b) of the Act empowers the Securities and Exchange Commission to invade the privacy of citizens by making all investigations which, *in the opinion of the Commission,* are necessary and proper for the enforcement of the Act, and empowers the Commission or officers designated by it to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers or other documents which the Commission deems relevant or material to the inquiry.

Section 22(b) of the Act provides for the issuance by the District Courts of orders to compel obedience to subpoenas issued by the Commission under the powers granted in Section 19(b) of the Act.

Assuming that the section provisions are constitutional and that Congress intended that they would comply with the provisions of the Fourth Amendment to the Constitution, which provides that "no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized," the order of the Commission specifies none of the things sought by a subpoena *duces tecum.*

Nor did the proceedings before the Commission, nor any of their orders, declare that, "in the opinion of the Commission (these things) are necessary and proper for the enforcement of this title." Neither does the application to the court, nor the orders of the Commission directing the investigation, assert that the Commission "deems the particular documents and papers relevant or material to the inquiry."

Assuming that the particular section is constitutional, all statutes must be read together. The provisions for subpoenas *duces tecum* are contained in Title 28, Section 647, which provides as follows:

> "When either party in such suit applies to any judge of a United States court in such district or Territory for a subpoena commanding the witness, therein to be named, to appear and testify before said commissioner, at the time and place to be stated in the subpoena, and to bring with him and produce to such commissioner any paper or writing or written instrument or book or other document, supposed to be in the possession or power of such witness, and to be described in the subpoena, such judge, on being satisfied by the affidavit of the person applying, or otherwise, that there is reason to believe that such

paper, writing, written instrument, book, or other document is in the possession or power of the witness, and that the same, if produced would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpoena accordingly. And if the witness, after being served with such subpoena, fails to produce to the commissioner, at the time and place stated in the subpoena, any such paper, writing, written instrument, book, or other document, being in his possession or power, and described in the subpoena, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpoena, or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court. When any such paper, writing, written instrument, book, or other document is produced to such commissioner, he shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as shall be required by either of the parties."

It will be noted that in order to secure a subpoena *duces tecum* such application for the subpoena must describe in the subpoena the papers, writings, books or other documents supposed to be in the possession or power of such witness, and it must be presented to a judge, who must be satisfied by the affidavit of the person applying, or otherwise, that there is reason to believe that such papers, writings, books or other documents are in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor.

It cannot be conceived that the Congress, in passing the Securities and Exchange Act, authorizing the issuance of a subpoena *duces tecum* in a proper case, intended that the subpoena *duces tecum* should be issued on any other conditions for the Commission than those provided for trial courts, and it did not give the Commission authority beyond or different than it gave to any person applying to a court for a subpoena *duces tecum.* Had it done any less than this it would have conflicted with the Fourth Amendment to the Constitution of the United States.

In *Grau v. United States,* 287 U. S. 124, 129, 77 L. Ed. 212, 214, the Supreme Court of the United States held that a warrant is void for failure to observe the statutory requirement that it state the particular grounds or probable cause for issuance, and for the further reason that it is based on affidavits which do not set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist. The court held that the affidavits in that case were insufficient as they unduly narrowed the guaranties of the Fourth Amendment, in consonance with which the statute was passed. Those guaranties are thereby liberally construed to prevent impairment of the protection extended. (*Boyd v. United States,* 116 U. S. 616, 635, 29 L. Ed. 746, 751; *Gouled v. United States,* 255 U. S. 298, 65 L. Ed. 647, 650; *Go-Bart Imp. Co. v. United States,* 282 U. S. 344, 357, 75 L. Ed. 374, 382.)

As stated in the *Grau* case further, "Congress intended, in adopting Section 25 of Title 2 of the National Prohibition Act, to preserve, not to encroach upon, the citizen's right to be immune from unreasonable searches and seizures, and we should so construe the legislation as to effect that purpose."

Tested by the provisions of the Constitution and the statute before a valid subpoena *duces tecum* could be issued by the Securities and Exchange Commission it was necessary to be presented by the Commission a list of the things supposed to be in the possession or power of such witness, and thereupon it was necessary for the Commission to make a finding that, in its opinion, these books and papers were necessary for the proper enforcement of the title, and that the Commission deemed these articles relative or material to the inquiry.

No such request was made, apparently, of the Commission, and no finding was made by the Commission that it deemed these books and records necessary and proper for the enforcement of this title. [R. 2, 8, 12.]

At this point, for the sake of argument, if Congress could constitutionally delegate this judicial function to the Securities and Exchange Commission—to find what was necessary and proper for the enforcement of this title, then the Commission would have to have presented to it, in order to comport with the Fourth Amendment, an affidavit setting forth the articles sought and the reasons for seeking them. The documents and things sought would have to be described with particularity.

The statutory provision either must be as broad as the constitutional guaranty which it seeks to avoid, or else the statute itself is unconstitutional. The situation is comparable to that in *Counselman v. Hitchcock,* 142 U. S. 547, 35 L. Ed. 1110, wherein the immunity provisions of the Fifth Amendment were sought to be met by provisions granting to those who testified immunity from prosecution. Because the statute was not as broad as the constitutional guaranty, the Supreme Court held the statute unconstitutional.

(b) The District Court Erred in Holding That Each of the Twenty Items Was Within the Scope and Jurisdiction of the Securities Act Giving the Commission Power to Investigate Them.

The district Court erred in holding that each of the twenty items which the subpoena, issued by an employee of the Securities and Exchange Commission, sought to get, was within the scope and jurisdiction of the Securities Act, giving the Commission power to investigate them.

It was error for the District Court to grant the application of the Commission and to issue its order requiring appellant to produce for examination by the Commission or its representatives "All books, records, documents, contracts, agreements, checks, bank statement, correspondence files and all other papers and memoranda in which have been entered a record of the transactions and business of The Penfield Company of California from the date of its incorporation to the date of this subpoena, including in particular, the following:" followed by items numbered 1 to 20 inclusive of said Order, for the following reasons:

Item 1—Minute Book,—contains confidential information concerning the business and affairs of appellant not relating to transactions in securities as defined in Section 2(1) of the Securities Act of 1933, as amended, except as to the issuance and sale of the original 500 shares at the price of $1.00 per share to three persons named in the permit issued by the State Corporation Commissioner of California dated April 5, 1939, as shown by affidavits and answer of appellant, and of Franklin Black and A. W. Young, its President and Secretary-Treasurer,

and M. Leland Stanford, Certified Public Accountant, filed in said proceeding, and such issuance and sale, not being a public offering of securities, was exempt from the registration requirements of Section 5(a) of the Securities Act under the exemption provisions of Section 4(1) of said Act. In any event any examination of such Minute Book should have been restricted to the issuance and sale of securities and should not have allowed the examination or inspection of any other portions or parts of such Minute Book, and certainly not the entire Minute Book, relating to many matters not in any way related to the issuance and sale of securities over which the Commission has any jurisdiction under the provisions of said Act.

Items 2 and 3—All stock certificate stub books and cancelled certificates of common and preferred stock; and alphabetical list of stockholders and addresses (if not shown on stub books indicated on Item No. 2 above)—since the affidavits and answer of appellant and of its officers showed that the only transactions recorded in such records were transfers by individual owners and holders of stock certificates for common stock of appellant out of the original issue of 500 shares and such transactions were not within the jurisdiction of the Commission and, therefore, it is not entitled to examine or inspect the records of appellant concerning or relating to same.

Items 4, 5 and 6—General Ledger, Cash Book, and General Journal—since these records relate to transactions other than transactions in securities, except the one transaction concerning the original issuance and sale of 500 shares at the price of $1.00 per share, and, therefore, the Commission has no jurisdiction over or right to

examine or inspect any entries in such books relating to transactions not in securities as defined in Section 2(1) of the Securities Act of 1933, as amended.

Item 7—Records reflecting the sale of whiskey, and/or whiskey warehouse receipts by the corporation—since these transactions were not transactions in securities as defined in Section 2(1) of the Act and the Commission, therefore, has no jurisdiction to examine or inspect any records of appellant relating to or concerning such transactions.

Item 8—Records relating to the sale of bottling contracts of Bourbon Sales Corporation, Louisville, Kentucky, by the corporation—since these transactions were not transactions in securities as defined in Section 2(1) of the Act, and the Commission, therefore, has no jurisdiction to examine or inspect any records of appellant relating to or concerning such transactions.

Item 9—Records relating to the sale of bottling contracts of The Penfield Company of California, by the corporation—for the same reason as above stated in reference to Item No. 8.

Item 10—Correspondence files, including letters received from and copies of letters sent to, all stockholders of The Penfield Company of California—since the issuance and sale of its stock by appellant was not within the jurisdiction of the Commission, and therefore it had no right or authority to examine or inspect correspondence files or letters relating to or concerning same.

Item 11—Correspondence files containing letters received from, and copies of letters sent to, all persons to whom bottling contracts of Bourbon Sales Corporation

or The Penfield Company of California were sold—since this correspondence relates to and concerns transactions which were not transactions in securities as defined in Section 2(1) of the Securities Act of 1933, as amended, and, therefore, the Commission has no right, authority or jurisdiction to demand the examination or inspection thereof.

Item 12—All cancelled checks of the corporation—since the only cancelled checks which the Commission has any right, authority or jurisdiction to examine or inspect, as provided in the Act, are those relating to or concerning sales by the appellant in securities as defined in Section 2(1) of the Act, and such examination should have been restricted and confined to cancelled checks relating to such transactions in securities and no other transactions whatever.

Item 13—Copies of confirmations or advices delivered in connection with the sale of stock of The Penfield Company of California or the sale of bottling contracts of Bourbon Sales Corporation, or The Penfield Company of California—since the only sale of stock by appellant was exempt from the registration provisions of the Act, and the transactions in bottling contracts were not transactions in securities as defined in Section 2(1) of the Act, and, therefore, the Commission has no authority, right or jurisdiction to examine or inspect any records of appellant relating to or concerning same.

Item 14—All original journal entries or journal vouchers supporting entries appearing in the general journal

or cash book,—since the only entries to which the Commission has jurisdiction or authority to investigate or to examine and inspect the records of appellant are those relating to transactions in securities as defined in Section 2(1) of the Act, and the Order of this District Court should have been restricted and confined to such entries relating to or concerning such transactions and should not have been broad enough to cover any other entries in such books.

Item 15—Copies of all prospectuses, sales material, sales letters, material in salesmen's kits or similar documents used in connection with the solicitation and sale of stock in The Penfield Company of California—since the only sale of stock by appellant, as hereinbefore stated, and as shown by the affidavits and answers in the record in the District Court, was the original issuance and sale of 500 shares which was exempt from the provisions of the Securities Act of 1933, as amended, and the affidavits and answers filed in the proceeding in the District Court showed that there were no such documents as described in this item.

Item 16—Copies of all prospectuses, sales material, sales letters, material in salesmen's kits or similar documents used in connection with the sale of bottling contracts of Bourbon Sales Corporation or The Penfield Company of California—since such material, if any, relates to transactions not in securities as defined in Section 2(1) of the Act, and, therefore, the Commission has no jurisdiction, right or authority to examine or inspect

any records of appellant relating to or concerning such transactions.

Item 17—Purchase invoices or records supporting the acquisition of whiskey, whiskey warehouse receipts of bottling contracts by The Penfield Company of California from private individuals for cash or in exchange for stock, bottling contracts or other securities—since transactions in the acquisition of whiskey, whiskey warehouse receipts or bottling contracts by appellant were not transactions in securities and, therefore, not within the jurisdiction of the Commission to investigate or to examine or inspect the records of appellant relating to or concerning same, and the evidence in the record shows conclusively that the appellant never issued any stock "or other securities" as defined in Section 2(1) of the Act for whiskey, whiskey warehouse receipts or bottling contracts.

Item 18—Purchase invoices or records supporting the acquisition of whiskey or whiskey warehouse receipts from distillers, whiskey warehouse receipts brokers or other persons or companies engaged in the whiskey business—since such transactions were merchandising transactions and not transactions in securities as defined in Section 2(1) of the Act, and therefore, the Commission is without jurisdiction over such transactions and has no right under the Act to examine or inspect any records of appellant relating to or concerning same.

Item 19—Sales invoices or records supporting the disposition of whiskey, whiskey warehouse receipts or bot-

tling contracts procured from investors—for the reason that such transactions were not transactions in securities as defined in Section 2(1) of the Act, and, therefore, the Commission is without jurisdiction or authority to examine or inspect records of appellant relating to or concerning same.

Item 20—Employment or other records showing names of all employees, salesmen or other personnel with last known addresses—since such records have no materiality or relevance to transactions in securities as defined in Section 2(1) of the Act, but relate to other business and affairs and transactions of appellant over which the Commission has no jurisdiction and, therefore, has no right to examine such records.

The record shows that many of these things were not within the scope or sphere of the Securities and Exchange Act. The taking of them constituted an unreasonable search and seizure. (*Jones v. Securities and Exchange Commission,* 298 U. S. 1, 80 L. Ed. 1015; *Hale v. Henkel,* 201 U. S. 43, 55 L. Ed. 873; *Federal Trade Commission v. American Tobacco Co.,* 264 U. S. 298; *Boyd v. United States,* 116 U. S. 616, 29 L. Ed. 746; *Interstate Com. Commission v. Brimson,* 154 U. S. 447.)

The measure of power is the mode prescribed in the statute.

Head v. Providence Insurance Co., 2 Cranch. 156;
Zottman v. S. F., 20 Cal. 102;
Michelson v. Painter, 35 Cal. 705;
Peo. v. Gunn, 85 Cal. 238, 248.

II.

The District Court Erred in Holding That the Investigation Was Not a General, Roving Inquiry, Violative of the Fourth Amendment to the Constitution of the United States, and That It Did Not Constitute an Unreasonable Search and Seizure of the Private Papers and Documents of Appellant.

The scope of the Securities and Exchange Commission's investigation was not confined to any particular alleged violation, nor was it based on any specific complaint. In its first hearing the Commission simply set out that members of the staff had reported that from May 10, 1939 to the date of the application the persons named in the order "sold and delivered to members of the public certain securities, namely, contracts for the bottling of whiskey issued by the Bourbon Sales Corporation." It did not set forth anywhere in either Exhibit A or Exhibit B, how all of its books, correspondence, records and memoranda could aid in this inquiry. The orders were "a general roving inquiry, violative of the Fourth Amendment to the Constitution of the United States." (*Jones v. Securities and Exchange Com.*, 298 U. S. 1, 80 L. Ed. 1015.

In *Hale v. Henkel,* 201 U. S. 76, 50 L. Ed. 666, the court said:

> "We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the 4th Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held

in the Boyd Case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena *duces tecum,* against which the person, be he individual or corporation, is entitled to protection. Applying the test of reasonableness to the present case, we think the subpoena *duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different states in the Union."

In *Silverthorne Lumber Co. v. United States,* 251 U. S. 391-393, 64 L. Ed. 321, 322, Mr. Justice Holmes said:

"It reduces the 4th Amendment to a form of words. (232 U. S. 393). The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. . . . In Linn v. United States, 163 C. C. A. 470, 251 Fed. 476, 480, it was thought that a different rule applied to a corporation, on the ground that it was not privileged from producing its books and papers. But the rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way."

In *Jones v. Securities and Exchange Com.*, 298 U. S. 23-27, 80 L. Ed. 1025-1027, the court said:

> "The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a government of laws—because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning. The admonition of Mr. Justice Bradley in Boyd v. United States, 116 U. S. 616, 625, 29 L. Ed. 746, 752, 6 S. Ct. 520, should never be forgotten: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of porcedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon. Their motto would be *obsta principiis.*'
>
> "Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Mr. Justice Day—'there is no place in our constitutional system for the exercise of arbitrary power.' Garfield v. United States, 211 U.

S. 249, 262, 53 L. Ed. 167, 174, 29 S. Ct. 62. To escape assumptions of such power on the part of the three primary departments of the government, is not enough. Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well. And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties.

"*Third.* The proceeding for a stop order having thus disappeared, manifestly it cannot serve as a basis for the order of the district court compelling petitioner to appear, give testimony, and produce his private books and papers for inspection by the commission. But the commission contends that the order may rest upon the general power to conduct investigations which it says is conferred by sec. 19(b). The difficulty with that is that the investigation was undertaken for the declared and sole purpose of determining whether a stop order should issue. The first action taken by the commission was on May 20th, four days before the registration was to become effective under the statute. The commission then, after averring that upon reasonable grounds it believed the registration statement was false in material facts, directed that stop-order proceedings be instituted against the statement. It never has averred or directed anything else. This action was

followed by a notice containing like results of a more detailed character, and calling upon the registrant to appear and show cause why a stop order should not be issued suspending the effectiveness of the statement. It was upon this direction and notice that all subsequent proceedings were had and upon which they must stand or fall. We do not interpret the order of the district court, the substance of which has already been stated, as resting upon a different view.

"Nothing appears in any of the proceedings taken by the commission to warrant the suggestion that the investigation was undertaken or would be carried on for any other purpose or to any different end than that specifically named. An official inquisition to compel disclosures of fact is not an end, but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means. The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer. Since here the only disclosed purpose for which the investigation was undertaken had ceased to be legitimate when the registrant rightfully withdrew his statement, the power of the commission to proceed with the inquiry necessarily came to an end. Dissociated from the only ground upon which the inquiry had been based, and no other being specified, further pursuit of the inquiry, obviously, would become what Mr. Justice Holmes characterized as 'a fishing expedition . . . for the chance that something discreditable might turn up' (Ellis v. Interstate Commerce Commission, 237 U. S. 434, 445, 59 L. ed. 1036, 1041, 35 S. Ct. 645)—an undertaking which uniformly has met with judicial condemnation. Re Pacific R. Commission (C. C.) 12 Sawy. 559, 32

F. 241, 250; Kilbourn v. Thompson, 103 U. S. 168, 190, 192, 193, 195, 196, 26 L. ed. 377, 386-389; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 S. Ct. 520; Harriman v. Interstate Commerce Commission, 211 U. S. 407, 419, 53 L. ed. 253, 263, 29 S. Ct. 115; Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 305-307, 68 L. ed. 696, 700, 701, 44 S. Ct. 326, 32 A. L. R. 786.

"Re Pacific R. Commission involved the power of a Congressional commission to investigate the private affairs, books and papers of officers and employees of certain corporations indebted to the government. That commission called before it the president of one of these corporations, required the production of private books and papers for inspection, and submitted interrogatories which the witness declined to answer. Acting under the statute, the commission sought a peremptory order from the circuit court to compel the witness to answer the interrogatories. The court, consisting of Mr. Justice Field, Circuit Judge Sawyer, and District Judge Sabin, denied the motion of the district attorney for the order and discharged the rule to show cause. Opinions were rendered seriatim, the principal one by Justice Field. The authority of the commission was definitely denied. That decision has frequently been cited and approved by the court. Judge Sawyer, in the course of his opinion (at p. 263), after observing that a bill in equity seeking a discovery upon general, loose and vague allegations is styled 'a fishing bill', and will, at once, be dismissed on that ground (Story, Eq. Pl. sec. 325), said: 'A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restric-

tions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it would end.'

"The fear that some malefactor may go unwhipped of justice weighs as nothing against this just and strong condemnation of a practice so odious. And, indeed, the fear itself has little of substance upon which to rest. The federal courts are open to the government; and the grand jury abides as the appropriate constitutional medium for the preliminary investigation of crime and the presentment of the accused for trial.

"The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government. An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing, to light. Cf. Byars v. United States, 273 U. S. 28, 29, 71 L. ed. 520, 522, 47 S. Ct. 248, and cases cited. If the action here of the commission be upheld, it follows that production and inspection may be enforced not only of books and private papers of the guilty, but those of the innocent as well, notwith-

standing the proceeding for 'registration, so far as the power of the commission is concerned, has been brought to an end by the complete and legal withdrawal of the registration statement.

"Exercise of 'such a power would be more pernicious to the innocent than useful to the public;' and approval of it must be denied, if there were no other reason for denial, because, like an unlawful search for evidence, it falls upon the innocent as well as upon the guilty and unjustly confounds the two. Entick v. Carrington, 19 How. St. Tr. 1030, 1074—followed by this court in Boyd v. United States, 116 U. S. 616, 629, 630, 29 L. ed. 746, 747, 751, 6 S. Ct. 522. No one can read these two great opinions, and the opinions in the Pacific R. Commission Case, from which the foregoing quotation is made, without perceiving how closely allied in principle are the three protective rights of the individual—that against compulsory self-accusation, that against unlawful searches and seizures, and that against unlawful inquisitorial investigations. They were among those intolerable abuses of the Star Chamber, which brought that institution to an end at the hands of the Long Parliament in 1640. Even the shortest step in the direction of curtailing one of these rights must be halted *in limine,* lest it serve as a precedent for further advances in the same direction, or for wrongful invasions of the others."

III.

The District Court Erred in Holding That the Provisions of Section 19(b) of the Securities Act of 1933 as Amended and Supplemented by the Provisions of Section 22(b) of Said Act, Inherently and as Construed and Applied in This Case, Are Not Invalid and Unconstitutional Because They Delegate Judicial Powers to the Securities and Exchange Commission in Violation of Article III of the Constitution of the United States, and Deprive the District Court of Judicial Functions as to What Matters Are or Are Not Relevant or Material to the Inquiry.

In the case of *Pacific Railway Commission v. Stanford*, 32 Fed. Rep. 241, approved in *Interstate Commerce Com. v. Brimson*, 154 U. S. 447, and *Innes v. Securities and Exchange Commission*, 80 L. Ed. 1015. We are quoting at length from the report of the case, but before reading it, we respectfully request this Court to note certain outstanding points of similarity between the statute construed in that case and the sections of the Securities Act of 1933 which we contend are invalid for the same reason that the Court in the above case declared the statute to be unconstitutional. Portions of the opinion deemed by counsel to be particularly important have been italicized. Following are excerpts from the syllabus prepared by the court:

> "1. The Pacific Railway Commission is not a judicial body, and possesses no judicial powers under the act of Congress of March 3, 1887, creating it, and can determine no rights of the government, or of the corporations whose affairs it is appointed to investigate.

"2. Congress cannot compel the production of private books and papers of citizens for its inspection, except in the course of judicial proceedings, or in suits instituted for that purpose, and then only upon averments that its rights in some way depend upon evidence therein contained.

"3. Congress cannot empower a commission to investigate the private affairs, books and papers of the officers and employees of corporation indebted to the government, as to their relations to other companies with which such corporations have had dealings, except so far as such officers and employees are willing to submit same for inspection; and the investigation of the Pacific Railway Commission into the affairs of officers and employees of the Pacific Railway Companies under the act of March 3, 1887, is limited to that extent.

* * * * * * * * *

"7. The judicial department is independent of the legislative, in the federal government, and Congress cannot make the courts its instruments in conducting mere legislative investigations.

* * * * * * * * *

"9. The Central Pacific Railroad Company is a state corporation, not subject to federal control, any further than a natural person similarly situated would be.

* * * * * * * * *

"12. The United States, as a creditor, cannot institute a compulsory investigation into the private affairs of the Central Pacific Railroad Company, or require it to exhibit its books and papers for inspection in any other way, or to any greater extent, than would be lawful in the case of private creditors and debtors."

The statement of facts (p. 243) contains the following:

"It is difficult to express in general terms the extent to which the commissioners are required to go in their inquisition into the business and affairs of the aided companies; or to which they may not go into other business and affairs of the directors, officers, and employees. The act itself must be read to form any conception of the all-pervading character of the scrutiny it exacts of them. And it provides that the commissioners, or either of them, shall have the power 'to require the attendance and testimony of witnesses, and the production of all books, papers, contracts, agreements, and documents relating to the matter under investigation, and to administer oaths; *and to that end may invoke the aid of any court of the United States in requiring the attendance of witnesses, and the production of books, papers and documents.' And it declares that 'any of the circuit or district courts of the United States* within the jurisdiction of which such inquiry is carried on, *may,* in case of contumacy or refusal to obey a subpoena issued to any person, *issue an order requiring any such person to appear before said commissioners, or either of them, as the case may be, and produce books and papers, if so ordered, and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.'* And also that *'the claim that any such testimony or evidence may tend to incriminate the person giving such evidence, shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person in the trial of any criminal proceeding.'"* (Italics supplied.)

The statement of facts in the above also contains the following (p. 242):

> "This is an application of the Pacific Railway Commission, created under the Act of Congress of March 3, 1887, 'Authorizing an investigation of the books, accounts, and methods of railroads which have received aid from the United States, and for other purposes,' for an order requiring a witness to answer certain interrogations propounded to him. That act authorizes the president to appoint three commissioners to examine the books, papers and methods of all railroad companies which have received aid in bonds from the government, and in terms invests them with power to make a searching investigation into the working and financial management, business, and affairs of the aided companies; and also to ascertain and report 'whether any of the directors, officers or employees of said companies, respectively, have been or are now, directly or indirectly, interested, and to what amount or extent, in any other railroad, steamship, telegraph, express, mining, construction, or other business company or corporation, and with which any agreements, undertakings or leases have been made or entered into; what amounts of money or credit have been loaned by any of said companies to any person or corporation; what amounts of money or credit have been or are now borrowed by any of said companies, giving names of lenders and the purposes for which said sums have been or are now required; what amounts of money or other valuable consideration, such as stocks, bonds, passes, and so forth, have been expended or paid out by said companies, whether for lawful or unlawful purposes, but for which sufficient and detailed vouchers have not been given or filed with the records of said company; and, further,

to inquire and report whether said companies, or either of them, or their officers or agents, have paid any money or other valuable consideration, or done any other act or thing, for the purpose of influencing legislation.' "

The Commission found vouchers showing total payments of $733,725.68 to Leland Stanford, President of the Central Pacific Railroad, between November 9, 1870 and December 21, 1880, as reimbursement for moneys expended by him, general expenses and legal services in behalf of the company. One voucher in question was for $171,781.89. Mr. Stanford, when under examination, was asked: "Was any part of the $171,000 paid for the purpose of influencing legislation?"

On advice of counsel, the witness refused to answer and the Commission applied to the federal court for an order compelling him to answer this and other questions of a similar nature. The witness did state that he could not remember the items that went to make up the total amount of the voucher.

Field, Circuit Justice, after filing the statement of facts, delivered the opinion of the court in which he stated, among other things:

> "In resisting the motion, counsel of the respondent have not confined themselves to a discussion of the propriety and necessity of the interrogatories, and the sufficiency of the answers given by him; but they have assailed the validity of the act creating the commission, so far as it authorizes an examination into the private affairs of the directors, officers and employees of the Central Pacific Railroad Co., and confers the right to invoke the power of the federal courts in aid of the general investigation directed. Impressed with

the gravity of the questions presented, we have given them all the consideration in our power.

"The Pacific Railway Commission, created under the act of Congress of March 3, 1887, is not a judicial body; it possesses no judicial powers; it can determine no rights of the government, or of the companies whose affairs it investigates. Those rights will remain the subject of judicial inquiry and determination as fully as though the commission had never been created; and in such inquiry its report to the president of its action will not be even admissible as evidence of any of the matters investigated. It is a mere board of inquiry, directed to obtain information upon certain matters, and report the result of its investigations to the president, who is to lay the same before Congress. In the progress of its investigations, and in furtherance of them, it is in terms authorized to invoke the aid of the courts in the United States, in requiring the attendance of witnesses, and the production of books, papers, and documents. And the act provides that the circuit or district court of the United States, within the jurisdiction of which the inquiry of the commission is had, in case of contumacy or refusal of any person to obey a subpoena to him, may issue an order requiring such person to appear before the commissioners, and produce books and papers, and give evidence touching the matters in question.

* * * * * * * * *

"* * * And in addition to the usual inquiries usually accompanying the taking of a census, there is no doubt that Congress may authorize a commission to obtain information upon any subject, which, in its judgment, it may be important to possess. It may inquire into the extent of the productions of the country

of every kind, natural and artificial, and seek information as to the habits, business, and even amusements of the people. *But in its inquiries it is controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters. In the pursuit of knowledge it cannot compel the production of the private books and papers of the citizen for its inspection, except in the progress of judicial proceedings, or in suits instituted for that purpose, and in both cases only upon averment that its rights are in some way dependent for enforcement upon the evidence those books and papers contain.* (Italics supplied.)

"Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value. The law provides for the compulsory production, in the progress of judicial proceedings, or by direct suit for that purpose, of such documents as affect the interest of others, and, in certain cases, for the seizure of criminating papers necessary for the prosecution of offenders against public justice, and only in one of the these ways can they be obtained, and their contents made known, against the will of the owners." (Italics supplied.)

"In the recent case of *Boyd v. United States,* 116 U. S. 616, the Supreme Court held that a provision of a law of Congress, which authorized a court of the United States, in revenue cases, on motion of the government attorney, to require the defendant or

claimant to produce in court his private books, invoices and papers, or that the allegations of the attorney respecting them should be taken as confessed, was unconstitutional and void as applied to suits for penalties or to establish a forfeiture of the parties' goods. The court, speaking by Mr. Justice Bradley, said:

> " 'Any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.' "

"The language thus used had reference, it is true, to the compulsory production of papers as a foundation for criminal proceedings, *but it is applicable to any such production of the private books and papers of a party otherwise than in the course of judicial proceedings, or a direct suit for that purpose. It is the forcible intrusion into, and compulsory exposure of, one's private affairs and papers, without judicial proceedings, which is contrary to the principles of a free government, and is abhorrent to the instincts of Englishmen and Americans.*" (Italics supplied.)

* * * * * * * * *

"Compulsory process to produce such papers, not in a judicial proceeding, but before a commissioner of inquiry, is as subversive of 'all the comforts of society' as their seizure under the general warrant condemned in that case. (*Entick v. Carrington*, 19 How. State Tr. 1029.) The principles laid down in the opinion

of Lord Camden, [in *Entick v. Carrington*] said the Supreme Court of the United States, *'affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court with its adventitious circumstances; they apply to all invasions on the part of the government, and its employees, of the sanctity of man's home and the privacies of life.'"* (Italics supplied.)

"In *Kilbourn v. Thompson,* 103 U. S. 168, we have a decision of the Supreme Court of the United States *that neither house of Congress has the power to make inquiries into the private affairs of the citizen; that is to compel exposure of such* affairs. * * *" (Italics supplied.)

After discussing the decision in *Kilbourn v. Thompson,* which that the resolution of Congress authorizing the speaker to appoint a committee to inquire into a so-called "real estate pool" was invalid as an attempt to delegate or exercise judicial power which by the Constitution is reserved to the judiciary, the court continued (p. 253):

"This case will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a congressional committee. The courts are open to the United States as they are to the private citizen, and both can there secure, by regular proceedings, ample protection of all rights and interests which are entitled to protection under a government of a written constitution and laws."

"The act of Congress not only authorizes a searching investigation into the methods, affairs, and business of the Central Pacific R. R. Co., but it makes it

the duty of the railway commission to inquire into, ascertain, and report whether any of the directors, officers or employees of that company have been, or are now, directly or indirectly interested, and to what extent, in any railroad, steamship, telegraph, express, mining, construction, *or other business company or corporation, and with which any agreements, undertakings, or leases have been made or entered into.* There are over 100 officers, principal and minor, of the Central Pacific R. R. Co. and nearly 5000 employees. It is not unreasonable to suppose that a large portion of these have some interest as stockholders or otherwise, with some other company or corporation with which the railway company may have an agreement of some kind, and it would be difficult to state the extent to which the explorations of the commission into the private affairs of these persons may not go if the mandate of the act be fully carried out. But in accordance with the principles declared in the case of *Kilbourn v. Thompson,* and the equally important doctrines announced in *Boyd v. United States,* the commission is limited in its inquiries as to the interest of these directors, officers and employees in any other business, company or corporation, *to such matters as these persons may choose to dissolve. They cannot be compelled to open these books, and expose such other business to the inspection and examination of the commission.* They were not prohibited from engaging in any other lawful business because of their interest in and connection with the Central Pacific R. R. Co., and that other business might as well be the construction and management of other railroads as the planting of vines, or the raising of fruit, in which some of these directors and officers and employees have been in fact engaged. And they are entitled to the same protec-

tion and exemption from inquisitorial investigation into such business as any other citizens engaged in such business. (Italics supplied.)

"Be that as it may, the federal courts cannot, upon that concession, aid the commission in ascertaining how the moneys were expended. *Those courts cannot become the instruments of the commission in furthering its investigation. Their power, its nature and extent, is defined by the Constitution.* The government established by that instrument is one of delegated powers, supreme in its prescribed sphere, but without authority beyond it. No department of it can exercise any powers not specifically enumerated or necessarily implied in those enumerated. * * * Any legislation of Congress beyond the limits of the powers delegated is an invasion of the rights reserved to the states or *to the people,* and is necessarily void. (Italics supplied.)

* * * * * * * * *

"*The judicial power of the United States is therefore* vested [by the Constitution] in the courts, and can only be exercised by them in the cases and controveries enumerated, and in petition for units of *habeas corpus. In no other proceedings can that power be invoked, and it is not competent for Congress to require its exercise in any other way.* Any act providing for such exercise could be a direct invasion of the rights reserved to the states or to the people; and it would be the duty of the courts to declare it null and void. Story says, in his commentaries on the Constitution, that 'the functions of the judges of the courts of the United States are strictly and exclusively judicial. They cannot, therefore, be called upon to advise the president in any executive measures, or to give extrajudicial interpretations of

the law, or to act as commissioners in cases of pensions or other like proceedings.'" Section 1777. (Italics supplied.)

* * * * * * * * *

The court, on p. 257, continued:

"The act of Congress creating the railway commission in terms provides, as already stated, that it may invoke the aid of any circuit or district court to require the attendance of witnesses, and the production of books, papers, and documents relating to the subject of inquiry; and empowers the court, in case of contumacy or refusal of persons to obey subpoenas to them, to issue orders requiring them to appear before the commissioners, or either of them, and produce the books, and papers ordered, and give evidence touching the matters in question, and to punish disobedience to its orders; *and does not appear to leave any discretion in the matter with the court.* It would seem as *though Congress intended that the court should make the orders upon the mere request of the commissioners, without regard to the nature of the inquiry. It is difficult to believe that it could have intended that the court should thus be the mere executor of the commissioners' will. And yet, if the commissioners are not bound, as they have asserted, by any rules of evidence in their investigations, and may receive hearsay, ex parte statements, and information of every character that may be brought to their attention, and the court is to aid them in this manner of investigation, there can be no room for the exercise of judgment as to the propriety of the questions asked, and the court if left merely to direct that the pleasure of the commissioners in the line of their inquiries be carried out.* But if it was expected that the court, when its aid is invoked, should ex-

amine the subject of the inquiries to see their character, so as to be able to determine the propriety and pertinency of the questions, and the propriety and necessity of producing the books, papers, and documents asked for before the commission, then it would be called upon to exercise advisory functions in an administrative or political proceeding, or to exercise judicial power. If the former, they cannot be invested in the court; if the latter, the power can only be exercised in the cases or controversies enumerated in the constitution, or in cases of *habeas corpus*. (Italics supplied.)

"The provision of the act authorizing the courts to aid in the investigation in the manner indicated must therefore be adjudged void. The federal courts, under the Constitution, cannot be made the aids to any investigation by a commission or committee into the affairs of anyone. If rights are to be protected or wrongs redressed by any investigation, it must be conducted by regular proceedings in the courts of justice in cases authorized by the Constitution." (Italics supplied.)

At page 259 the court concluded:

"The conclusion we have thus reached disposes of the petition of the railway commissioners, and renders it unnecessary to consider whether the interrogatories propounded were proper in themselves, or were sufficiently met by the answers given by Mr. Stanford, or whether any of them were open to objections for the assumptions they made, or the imputations they implied. *It is enough that the federal courts cannot be made the instruments to aid the commissioners in their investigations.* It also renders it unnecessary to make any comment upon the extraordinary position taken by them according to the statement of the re-

spondent, to which we have referred, that they [commisisoners] did not regard themselves bound in their examination by the ordinary rules of evidence, but would receive hearsay and *ex parte* statements, surmises, and information of every character that might be called to their attention. *It cannot be that the courts of the United States can be used in furtherance of investigations in which all rules of evidence may be thus disregarded.*" (Italics supplied.)

The decision in the above case could not have been more in point or more applicable to the constitutional question here considered had the court actually been considering Section 19(b) and 22(b) of the present Securities Act. Some of the points of similarity in the statute construed in the above case and the sections, the constitutionality of which is questioned in this procedure, are the following:

The Act of March 3, 1887, created the Pacific Railway Commission as an administrative agency of the government, just as the Securities Act of 1933 created the Securities & Exchange Commission as such an administrative agency. The 1887 statute provided that the commissioners, or either of them, shall have the power "to require the attendance and testimony of witnesses, and the production of all books, papers, contracts, agreements, and documents relating to the matter under investigation, and to administer oaths"; while Section 19(b) of this statute grants the same powers to this Commission, except that it goes very much farther because in the former statute the Act provided that the documents, the production of which could be required by the Pacific Railway Commission, must meet the requirement of *"relating to the matter under investigation."*

That language meant that it must be shown to the satisfaction of the Court in a proceeding to enforce the Commission's subpoena for documents, that such documents met with the usual requirements as to their materiality and relevancy to the subject matter of the inquiry, which question the Court, when asked to enforce such production, had opportunity to pass upon.

This statute in Section 19(b) goes farther than the statute there considered by providing that "for the purpose of all investigations *which, in the opinion of the Commission,* are necessary and proper for the enforcement of this title, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents *which the Commission deems relevant or material to the inquiry.*"

In the *Pacific Railway Commission* case, by its wording the Act under consideration restricted the production of books, papers and documents the production of which might be demanded by the Commission, aided if necessary by the Order of the Court, to those *"relating to the matter under investigation."* There was no unlimited delegation of power or authorization to that Commission to make any investigation which *"in its opinion"* was necessary and proper for the enforcement of its Act, or to require the production of books, papers and records which the Commission (not the Court) "deemed relevant or material to the inquiry."

In the 1887 Act, it was provided:

> "Any of the Circuit or District Courts of the United States within the jurisdiction of which such

inquiry is carried on, MAY, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring any such person to appear before said commissioners, or either of them, as the case may be, and produce books and papers, if so ordered, and give evidence touching the matter in question; and any failure to obey such Order of the Court may be punished by such court as a contempt thereof."

Section 22(b) of the Securities Act of 1933 provides:

"In case of contumacy or refusal to obey a subpoena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission, MAY issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof."

The word "may" has been capitalized and underscored in both of the above quotations for the purpose of emphasizing the importance of that particular word in both Acts.

It was contended in the *Pacific Railway Commission* case, and undoubtedly will be contended by the Commission in this case, that the word "may" leaves sufficient leeway for the exercise of their judicial discretion and judicial power and authority by the United States courts, to consider and pass upon any application of the Commission according to the established rules of judicial procedure.

But the Court's attention is respectfully invited to the quotation from page 257 of the Report, in which the District Court in the above case said that such wording "does not appear to leave any discretion in the matter with the court"; and that:

> "It would seem as though Congress intended that the court should make the orders upon the mere request of the commissioners, without regard to the nature of the inquiry. It is difficult to believe that it could have intended that the court should thus be the mere executor of the commissioners' will, and yet if the commissioners are not bound, as they have asserted, by any rules of evidence in their investigations, and may receive hearsay, *ex parte* statements, and information of every character that may be brought to their attention, and the court is to aid them in this manner of investigation, there can be no room for the exercise of judgment as to the propriety of the questions asked, and the court, if left merely to direct that the pleasure of the commissioners in the line of their inquiries be carried out."

Every word of the court which was applied to the 1887 statute, is equally and as completely applicable if applied to the Securities Act of 1933, and the use of the word "may" in both cases emphasizes the importance of this comparison.

In the present proceeding the Commission has strenuously contended before the Court below that under the provisions of Section 19(b) of its Act as supplemented by Section 22(b), all that the Commission was required to do in its application for an Order directing compliance with its subpoena *duces tecum*, was to assert that in its opinion the investigation was proper and necessary for

the enforcement of the Act, and that the documents demanded in its subpoena were deemed to be relevant and material to the inquiry. The Commission itself did not so find. But if it had it would still be unconstitutional.

In support of Respondent's contention that the constitutionality of Act is not saved by the provisions of Section 22(c) of the Securities Act providing in substance that no person shall be excused from attending and testifying or from producing books, papers, contracts, agreements or other documents before the Commission on the ground of self-incrimination, or subjection to the penalty of forfeiture, and further providing that no individual shall be prosecuted or subjected to any penalty or forfeiture for, or on account of, any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, since a provision in similar language and effect was also included in the provision in the Act of March 3, 1887 declared to be unconstitutional, the provision in that Act being:

> "The claim that any such testimony or evidence may tend to incriminate the person giving such evidence, shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person in the trial of any criminal procedure."

In *Interstate Commerce Commission v. Brimson* (1893), 154 U. S. 447, Mr. Justice Harlan said, at pages 478-479:

> "We do not overlook these *constitutional limitations* which, for the protection of personal rights, most necessarily attend all investigations conducted under the authority of Congress. *Neither branch of the*

legislative department, still less any administrative body, established by Congress, possesses or can be invested with, a general power of making inquiry into the private affairs of a citizen. Kilbourn v. Thompson, 103 U. S. 188, 190. We said in *Boyd v. United States,* 116 U. S. 616, 630,—and it cannot be too often repeated—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employees of the sanctity of a man's home and the privacy of his life. As said by Mr. Justice Field in *In re Pacific Railway Commission,* 32 Fed. Rep. 241, 250, *'of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half* their value.' " (Italics supplied.)

Thus, by repeating the learned declaration of fundamental constitutional rights of citizens, and the consequent constitutional limitations on Congress in investing power in administrative agencies and commissions to invade the private rights, papers and records of citizens, the United States Supreme Court in the above case so emphatically stamped its aproval upon the decision of Judge Field in the *Pacific Railway Commission* case, that this Court, in considering that decision may well give it the same weight that it would have given if the decision had been originally expressed by, or affirmed on appeal by, the Supreme Court, and counsel respectfully asks that such weight be given that decision in ruling upon the question here presented.

Later in the *Brimson* case, *supra,* the Supreme Court referred to the amendment of the Interstate Commerce Act (27 Stat. 443, C. 83) which provided that no person should be excused from appearing, testifying, producing his books and records, etc., and granting immunity for the testimony or evidence thus compelled, but the court remarked that "that act was not in force when this case was determined below." However, in the *Pacific Railway Commission* case the statute under consideration did have such an immunity provision, the same in effect as now appears in Section 22(c) of the Securities Act, so that such right of immunity was considered, but did not change the result in that case.

Kilbourn v. Thompson (1880), 103 U. S. 168, was a case where a witness refused to answer certain questions put to him as a witness by the House of Representatives concerning the business of a real estate partnership of which he was a member, and to produce certain books and papers in relation thereto. The witness by order of the House was imprisoned for 45 days and brought suit against the Sergeant-at-arms who imprisoned him, and the members of the committee where he was adjudged in contempt.

The Court, by Mr. Justice Miller, said:

> "No general power of inflicting punishment by the Congress of the United States is found in that instrument (Constitution). It contains in the provision that 'no person shall be deprived of life, liberty or property, without due process of law,' the strongest implication against punishment by order of the legislative body. It has repeatedly been decided by this court, and by others of the highest authority, that this means a trial in which the rights of the

party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established. An act of Congress which proposed to adjudge a man guilty of a crime and inflict the punishment, would be conceded by all thinking men to be unauthorized by anything in the Constitution. . . ."

"Whether this power of punishment in either house by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either house, *unless his testimony is required in a matter into which the House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possess the general power of making inquiry into the private affairs of the citizen.* (Italics supplied.)

* * * * * * * * *

"In looking to the preamble and resolution under which the committee acted, before which Kilbourn refused to testify, we are of opinion that the House of Representatives *not only exceeded the limit of its own authority, but assumed a power which could* only be properly exercised by another branch of the government, because it was in its nature clearly judicial." (Italics supplied.)

"The Constitution declares that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress or either branch of it, save in the cases specifically enumerated to which we have referred. (Referring to punish-

ment of its own members, etc.) If the investigation which the committee was directed to make was judicial in its character, and could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could only be had by a judicial proceeding, we do not, after that has been said, deem it necessary to discuss the proposition that the power attempted to be exercised was one confided by the Constitution to the judicial and not the legislative department of the government. We think it equally clear that the power asserted is judicial and not legislative.

* * * * * * * * *

"We are of opinion, for these reasons, that the resolution of the House of Representatives authorizing the investigation was in excess of the power conferred on that body by the Constitution; that the committee, therefore, had no lawful authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that the orders and resolutions of the House, and the warrant of the Speaker, under which Kilbourn was imprisoned, are, in like manner, void for want of jurisdiction in that body, and that his imprisonment was without lawful authority."

In *Boyd v. United States*, 116 U. S. 616 (1885), the court, in its opinion delivered by Mr. Justice Bradley, after reviewing the English and American law, said, among other things (pp. 631-632):

"The court of chancery had for generations been weighing and balancing the rules to be observed in granting discovery on bills filed for that purpose, in the endeavor to fix upon such as would best secure the ends of justice. To go beyond the point to which

that Court had gone may well have been thought hazardous. Now it is elementary knowledge, that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. *And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government.* It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. *It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."* (Italics supplied.)

"We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. *And we have been unable to perceive that the seizure of a man's private books and papers to be used as evidence against him is substantially different from compelling him to be a witness against himself.* We think it is within the clear intent and meaning of those terms. We are also clearly of the opinion that proceedings instituted for the purpose of declaring a forfeiture of a man's property by reason of offenses committed by

him, though they may be civil in form, are in their nature criminal . . ." (Italics supplied.)

The conclusion of the court, however, was that the statute in question did not violate the Fourth Amendment, the court saying:

"I cannot conceive how a statute aptly framed to require the production of evidence *in a suit* by mere service of notice on the party, who has the evidence in his possession, can be held to authorize an unreasonable search or seizure, when no seizure is authorized or permitted by the statute." (Italics supplied.)

NOTE: In the above statute, however, the books were required to be produced in court in a suit duly instituted and the court could pass upon the relevancy or admissibility of anything offered as evidence by the Government, which is not true under the provisions of the Securities Act of 1933, which provides in Sections 19(b) and 22(b) for the books, papers and records to be delivered to the Commission and for no restriction upon their examination, once in possession, by reason of the materiality or relevancy of any information therein contained which might be held inadmissible if the documents were to be produced in court, where objections of counsel on these points could be offered and ruled on by the court.

In *Aetna Life Insurance Co. v. Haworth* (1936), 300 U. S. 239, Chief Justice Hughes cited the *Pacific Railway Commission Case* with approval, saying on page 239:

"First, The Constitution limits the exercise of the judicial power to 'cases' and 'controversies.' The

> term 'controversies,' if distinguishable at all from 'cases' is so that it is less comprehensive than the latter, and includes only suits of a civil nature."

Per Mr. Justice Field in *In Re Pacific Railway Commission,* 32 Fed. 241, 255, citing *Chisholm v. Georgia,* 2 Dall. 419, 431, 432.

The *Pacific Railway Commission* decision was also cited in connection with above excerpt from Chief Justice Hughes opinion in *Smith v. Blackwell* (D. C. D. N. J. 1937), 18 F. Supp. 450, 453; in *In Re Andrews Tax Liability* (D. C. D. Md. 1937), 15 F. Supp. 804, 808; in *United States v. Hoffman* (D. C. S. D. N. Y. 1938), 24 F. Supp. 847, 849.

In *Attorney General v. Brissenden,* 271 Mass. 172 it was said by Chief Justice Rugg:

> "In conducting any investigation, whether by a committee of its members, or through other agency, the General Court is bound to observe all provisions of the Constitution designed to protect the individual in the enjoyment of life, liberty and property, and from inquisitions into private affairs."

In *Annenberg v. Roberts,* 333 Pa. 214, decided by the Supreme Court of that state (1938), the court after quoting the above excerpt from the opinion of Chief Justice Rugg of the Massachusetts Supreme Court added (p. 214):

> "While the act under consideration in the present case seems to recognize this fundamental principle, since it authorizes the issue only of such subpoenas as require answers to questions *'touching matters properly being inquired into by the Commission'* and the compulsary production only of such books, papers,

records and documents as relate *'to the subject of inquiry,'* we are in accord with the observations made by the court below as to the irrelevance of information called for in the subpoenas issued to these plaintiffs; it follows that there is a constitutional lack of power in the Commission to demand it." (Italics supplied.)

"The subpoenas show on their face that they contemplate an unreasonable search and seizure. They violate the principle which we announced in *American Car & Foundry Co. v. Alexandria Water Co.*, 221 Pa. 529, where we held that a subpoena duces tecum could not properly be issued to bring in a mass of books and papers in order that there might be a search through them to gather evidence. We, therefore, are of opinion that the subpoenas as issued commanding plaintiffs to produce before the Commission the things therein set forth are void, in that they do not show that the demands are germane to the inquiry authorized by the Governor's call. . . ."

"We cannot agree with the conclusions of the court below that these proceedings have been prematurely brought and that the time for the plaintiffs to raise their objections to the subpoena is when questions are propounded to them or documents demanded at the hearing. Under our system of constitutional government it has become established that equity will restrain public officials from acting pursuant to legislation found to be unconstitutional and that relief will be granted on the application of one whose rights are injuriously affected; the cases on this subject are numerous.

"The important question is, where and how may a person served with a demand such as appears in the record, assert the right? The parties from whom

an alleged demand for documents has been made 'are not required' as we said in *Brown v. Brancato*, 321 Pa. 54, 61, to test the alleged right of such person by forcibly resisting his unlawful efforts to seize the books and records of their administration, or, for defiance of the committee's subpoenas, by subsequently justifying their resistance in proceedings for contempt or in habeas corpus (cf. *Ex Parte Caldwell*, 61 N. Va. 49, 55 S. E. 910; *McGrain v. Daugherty*, 273 U. S. 135) *or by suffering themselves to be indicted* (cf. *Com. v. Costello*, 21 D. R. 232). Equity has jurisdiction to restrain if the committee is without lawful authority in the premises (citing Pa. cases) * * *."

And at page 215, the court continued:

"A difference is to be noted between an unlawful demand contained in a subpoena duces tecum in cases pending in court (as in *American Car & Foundry Co. v. Alexandria Water Co., supra*), and a demand made by a nonjudicial body. In court parties and witnesses may, by appropriate application made in the proceedings have their rights determined and preserved, *but proceedings before a nonjudicial body are in a different class. Parties aggrieved in such proceedings must also have opportunity for judicial hearing if their rights are to be determined and preserved. Here, as before stated, the demands for the production of documents show on their face that they violate plaintiff's constitutional rights; this being so, plaintiffs are entitled now to challenge them and to have them abated and set aside, which is accordingly done.*" (Italics supplied.)

In *Crowell v. Benson* (1932), 285 U. S. 22, at page 56, the Supreme Court, in discussing the extent to which

findings of a Commission may be made binding on the courts, remarked:

> "In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. *It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restriction.* It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. *The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."* (Italics supplied.)

The same principle of unlawful delegation of power applies whether it be "judicial" or "legislative" power, and the following decisions on unlawful delegation of legislative powers are pertinent in considering the question now before this Court.

IV.

The District Court Erred in Holding That Transactions in Distillers' Whiskey Warehouse Receipts Were Transactions Within the Meaning of Section 2(1) of the Securities Act as Amended in 1933.

A warehouse receipt represents the property described therein, and a transfer of the same is a symbolic delivery of the goods called for by the receipt and passes title to the goods as effectually as if an actual delivery were made. (Civ. Code, sec. 1858b; *A. Widemann Co. v. Digges,* 21 Cal. App. 342, 131 Pac. 882; *Cavallaro v. Texas etc. Ry. Co.,* 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94; *Garoutte v. Williamson,* 108 Cal. 135, 41 Pac. 35; *Bishop v. Fulkerth,* 68 Cal. 607, 10 Pac. 122; *Davis v. Russell,* 52 Cal. 611, 28 Am. Rep. 647.) Thus, by the issuance or transfer of a warehouse receipt for whiskey held in bond in Kentucky, there is in fact a sale and a constructive delivery within the state of California of a commodity, although at the time of the sale it is and may forever remain elsewhere, and as between the vendor and the vendee there is no distinction between the solicitation of orders for the whiskey and the solicitation of orders for warehouse receipts representing the same.

V.

The District Court Erred in Holding That Bottling Contracts of the Bourbon Sales Corporation or The Penfield Company of California Were Transactions in Securities as Defined in Section 2(1) of the Securities Act of 1933 and Therefore Conferred Jurisdiction Upon the Securities and Exchange Commission.

These contracts were contracts to bottle whiskey and pay the tax on it. They were not contracts for a security, but for the performance of certain work and labor in connection with the bottling of whiskey. Many wholesalers, retailers, large corporations, hotels, etc., daily send warehouse receipts owned by them to licensed bottlers with instructions to the bottlers to "tax pay" the whiskey, bottle and label it and ship it to them through the regular channels of bottler to a licensed wholesaler, wholesaler to licensed retailer, retailer to the original owner, etc., as the case may require. The bottler bills the wholesaler for the taxes and other charges he has paid, plus his cost of bottling. The wholesaler bills the retailer for the same charges, plus his handling fee, and the retailer does likewise.

There is nothing in the transaction, therefore, that makes it a security within the meaning of the Securities Act.

A security does not extend to ordinary commercial contracts, nor does it include interest income from the lending of money or the profits which one might make from his own efforts as the result of any ordinary commercial contract. (*Lewis v. Creasey Corp.,* 198 Ky. 407, 248 S. W. 1046.)

Conclusion.

It is therefore respectfully submitted that the District Court erred in authorizing and approving an order issuing the *subpoena duces tecum* and compelling the appellant and its representatives to produce in court all of the matters and things therein set forth; that at no time did the Commission ever establish jurisdiction by an appropriate order; that at no time did the Commission ever, by any order, declare that in its opinion or judgment the matters and things thereafter sought by one of its agents to be secured were relevant or material to the inquiry; in its opinion that such declaration is a necessary statutory foundation before any subpoena can be issued or sought; that the representatives of the Commission were about to embark upon and are embarking upon a general, roving, inquisitorial expedition, specifically forbidden by the Fourth and Fifth Amendments to the Constitution of the United States; that the statute, if given the construction placed upon it by the District Court, inherently and as construed and applied, would be unconstitutional, in violation of the Fourth and Fifth Amendments and Article III of the Constitution of the United States; that the Commission was without jurisdiction in any event to subpoena the various matters therein sought, as they, the matters allegedly the object of investigation, were not and are not securities within the meaning of the Securities and Exchange Act.

Wherefore, for each and all of these reasons appellant prays that the judgment of the District Court be reversed.

Respectfully submitted,

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